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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

CONRAD JOYNER,
Petitioner,

vs.

ROSE MOFFORD, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the Qualification Clause of the Constitution prohibit a state from requiring that state-elected officials who are candidates for federal office resign before running for federal office?

INDEX

Page

Opinion Below 1

Jurisdiction 1

Question Presented for Review 2

Constitutional Provision Involved 2

Statement of the Case 2

Reasons for Granting the Writ

1. The Opinion Below is Inconsistent with Prior Decisions of this Court Interpreting the Qualifications Clause of the United States Constitution 3

2. National Uniformity is Needed Because State Provisions Requiring Resignation of State Officeholders when Running for Federal Office and Judicial Interpretation of those Provisions vary Greatly 9

Conclusion 10

CITATIONS

CASES:

Baker v. Carr, 369 U.S. 186 (1962) 8

Bullock v. Carter, 405 U.S. 134 (1972) 8

Celebreeze v. Anderson, 103 S.Ct. 1564, (1983) 7, 8, 9

INDEX (Continued)

Page

Clements v. Fashing, 102 S.Ct. 2836, (1982) 6

Cousins v. Wigoda, 429 U.S. 477 (1975) 9

Davis v. Adams, 400 U.S. 1203 (1970) 7

Joyner v. Mofford, 706 F.2d 1523 (9th Cir. 1983) 1, 4, 5, 6, 7, 10

Joyner v. Mofford, 539 F.Supp. 1120 (D. Ariz. 1982) 3

Locks v. Commanding General, Sixth Army, 88 S.Ct. 31, (1968) 7

People v. Sischo, 23 Cal.2d 478, 144 P.2d 785 (1943) 7

Powell v. McCormack, 395 U.S. 486 (1969).... 4, 5, 6, 8

Reynolds v. Sims, 377 U.S. 533 (1964) 8

Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980) 6

Stack v. Adams, 315 F.Supp. 1295 (N.D. Fla. 1970) 7

State ex rel. Davis v. Adams, 238 So.2d 415 (Fla. 1970) 7

State ex rel. O'Sullivan v. Swanson, 127 Neb. 806 257 N.W. 255 (1934) 7

State ex rel. Santini v. Swackhamer, 90 Nev. 153, 521 P.2d 568 (1974) 7

INDEX (Continued)

Page

Wesberry v. Sanders, 376 U.S. 1 (1964) 8

United States v. Richmond, 550 F.Supp. 605 (E.D.N.Y. 1982) 7

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U. S. Const., art. I, § 2, cl. 2..... 2, 4, 5, 6, 7, 10

Ariz. Const., art. XXII, § 18 ..... 2, 4

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

28 U.S.C. §2201 3

A.R.S. §12-2041, Ariz. Rev. Stat. Ann. 3

MISCELLANEOUS:

Debates on the Federal Constitution (J. Elliot ed. 1876) 8

The Federalist Papers (Mentor ed. 1961) 5

J. Story, *Commentaries on the Constitution of the United States* (1891 ed.) 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Conrad Joyner, respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix B) is reported at 706 F.2d 1523 (1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 23, 1983. A timely petition for rehearing was denied on July 12, 1983. The mandate was issued on July 20, 1983. This petition

is filed within the time permitted under 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Does the Qualifications Clause of the Contitution prohibit a state from requiring that state-elected officials who are candidates for federal office resign before running for federal office?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. Art. I, § 2, cl.2 (The Qualifications Clause):

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

2. Ariz. Const. Art. XXII, § 18:

Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

STATEMENT OF THE CASE

In 1980, the Arizona Contitution was amended to add Article XXII, § 18. The new provision, known as a "resign-to-run" clause, requires an elected, salaried public official to resign when running for other office, unless he or she is in the last year of the term of office.

In 1980, petitioner, Conrad Joyner, was elected to

a third four-year term as County Supervisor in District 5 of Pima County, Arizona. In 1982, due to decennial reapportionment of congressional districts, a new fifth congressional district for Arizona was formed. Joyner, who was interested in running for the new congressional seat, filed a declaratory judgment action under 28 U.S.C. § 2201 to challenge the constitutionality of the resign-to-run provision.

Cross-motions for summary judgment were filed, and the District Court ruled that the provision was unconstitutional. *Joyner v. Mofford*, 539 F.Supp. 1120 (D. Ariz. 1982) (*See* Appendix A). The state filed a timely appeal to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court.

After the District Court struck down the resign-to-run provision, Joyner filed petitions for nomination to seek election to the Fifth District. He did not resign as County Supervisor. Joyner was subsequently defeated in the primary election.

After the mandate issued from the Court of Appeals, the Arizona Attorney General threatened to remove the petitioner from his county office through the *quo warranto* power of A.R.S. § 12-2041. Petitioner moved for a stay and an order withdrawing the mandate, and the Court of Appeals granted that motion.

REASONS FOR GRANTING WRIT

1. **The opinion below is inconsistent with prior decisions of this Court interpreting the Qualifications Clause of the United States Constitution.**

The Constitution has set forth three qualifications for eligibility to the House of Representatives: a member must be 25 years of age, must be a United States

citizen for 7 years, and must be a resident of the state from which he shall be chosen. Art I, § 2, cl.2 (The Qualifications Clause). This Court has held that these three qualifications are exclusive and cannot be varied, even by Congress. *Powell v. McCormack*, 395 U.S. 486 (1969).

> In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. *Id.* at 548.

Powell also discusses, in dicta, the ability of a state to change the Qualifications Clause and concludes that a state has no more power to do so than does Congress. *Id.* at 543. The effect of Article XXII, Section 18, of the Arizona Constitution, is to require four qualifications for candidacy for the House of Representatives: 25 years of age, a United States citizen for 7 years, a resident of the State from which he shall be chosen *and* to not be an elected state official in other than the last year in office. This is an impermissible attempt by a state to vary the Qualifications Clause of the Constitution.

A. The Arizona provision is an extra qualification for candidacy to Congress.

The Court of Appeals held Arizona resign-to-run provision constitutionally permissible because it ". . . merely bars state officeholders from remaining in their position should they choose to run for federal office." *Joyner v. Mofford*, 706 F.2d, at 1528. The resulting "burden on candidacy" was deemed acceptable because it was "attributable to a desire to regulate state office-

holders and not to impose additional qualifications to serving in Congress." *Id.*

Whatever the intention of the provision, its effect is, as the Court of Appeals recognized, to place a "not inconsequential" burden on candidacy for federal office. *Id.* at 1533. The history of the Qualifications Clause and its judicial interpretation highlights its exclusivity and demonstrates that such a burden is an impermissible qualification.

The Qualifications Clause was debated at length at the Constitutional Convention. The delegates concluded that only a few basic minimum qualifications should be prerequisites to membership in Congress. *Powell v. McCormack,* 395 U.S. at 532-36, 541. As James Madison wrote, once a person met the minimum standards found in the Qualifications Clause:

> . . . [t]he door of this part of the federal government is open to merit of every description, whether native or adopted, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.

The Federalist Papers, 326 (Mentor ed. 1961).
As this Court has noted, one of the main concerns at the Convention was that if the qualifications for federal office were subject to variation by the legislature, it could "by degrees subvert the Constitution." *Powell v. McCormack,* 395 U.S., at 533-34.

While the Qualifications Clause does not expressly limit states from adding qualifications either directly or indirectly, it seems clear that by listing only three qualifications "it meant to exclude all other as prerequisites."

1 Story, *Commentaries on the Constitution of the United States*, § 625, at 461 (1891 ed.).

The Court of Appeals, based on *Clements v. Fashing*, 102 S.Ct. 2836 (1982) and *Signorelli v. Evans*, 637 F.2d 863 (2d Cir. 1980), found several justifications for the Arizona resign-to-run provision. The provision theoretically encourages public officials to devote themselves to their office, prevents them from using their office as a "stepping stone," prevents abuse of the office, and protects the expectations of the electorate. *Joyner v. Mofford*, 706 F.2d, at 1532.

These justifications are very legitimate. But, they are no more important than the justifications in *Powell*: the honesty and integrity of Congress. Just as the justifications in *Powell* did not allow Congress to exclude Adam Clayton Powell, so to must Arizona's provision fail. Neither the Congress nor a state can ever vary the absolute standards of the Qualifications Clause. The rationality of the reasons to vary the Qualifications Clause is not the issue.

Clements involved a restriction on state officeholders running for state office. As Justice Stevens (as well as the four dissenting members of the Court) noted in his concurring opinion, there was no federal interest involved in *Clements*. Further, there was no Qualifications Clause issue in *Clements*.

In *Clements*, this Court applied only a rational basis test. The Ninth Circuit, which ruled that Arizona's provision would survive even a strict scrutiny analysis, implies in its holding that whenever a state has a valid reason, it may contradict, burden or otherwise restrict the exercise of federal constitutional rights. When this

implicit conclusion is taken into consideration, it becomes obvious that neither rational basis nor strict scrutiny is an appropriate test for the Arizona provision. Rather, any action by a state which affects eligibility for federal office must be, per se, invalid. *See generally, Celebreeze v. Anderson,* 103 S.Ct. 1564, 1578-79. (1983).

This Court has never considered the Qualifications Clause issue in this factual situation. In a similar case, however, involving the validity of a resign to qualify to run for Congress statute, Justice Black stated that he thought such a restriction was unconstitutional. *Davis v. Adams,* 400 U.S. 1203 (1970). *See also, Stack v. Adams,* 315 F.Supp. 1295 (N.D. Fla. 1970) and *State ex rel Davis v. Adams* 238 So.2d 415 (Fla. 1970). The opinion of Justice Black, while not controlling authority, *Locks v. Commanding General, Sixth Army,* 89 S.Ct. 31, 32 (Douglas, Circuit Justice, 1968), is nonetheless persuasive because it dealt with a similar provision.

Numerous other state and federal district courts agreed with Justice Black and invalidated state provisions regulating candidates for federal office. *Joyner v. Mofford,* 706 F.2d at 1529, fn.4. See also, *State ex rel. O'Sullivan v. Swanson,* 127 Neb. 806, 257 N.W. 255 (1934); *People v. Sischo,* 23 Cal.2d 478 144 P.2d 785 (1943); *State ex rel. Santini v. Swackhamer,* 90 Nev. 153, 521 P.2d 568 (1974); *United States v. Richmond,* 550 F.Supp. 605 (E.D.N.Y. 1982). While these provisions differed in form and intent, their effect was disqualification from seeking federal office.

The Ninth Circuit distinguished resign-to-run laws such as Arizona has, from resign-to-qualify-to-run laws

such as found in *Stack*. The distinction is not appropriate. Since state officeholders seeking federal office know that if they run, they must resign their state office, the effect of the two laws is identical, regardless of any differences in form.

B. The Arizona provision limits the number of potential candidates.

The second effect of the resign-to-run provision is to limit the number of candidates for federal public office. It is an undisputed principle of our form of government that the people have the right to elect whom they choose. 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876) cited in *Powell v. McCormack*, 395 U.S., at 540-41. *See also, Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). This right is "undermined as much be limiting whom the people can select as by limiting the franchise itself." *Powell v. McCormack*, 395 U.S. at 547.

While the State's focus on the Arizona provision has been on the office and the officeholder, it must be recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Celebreeze v. Anderson*, 103 S.Ct. at 1568. Therefore, before any analysis of a law restricting potential candidates is complete, "it is essential to examine in a realistic light the extent and nature of [its] impact on voters." *Bullock v. Carter*, 405 U.S. at 143; *Celebreeze v. Anderson*, 103 S.Ct. at 1568.

The resign-to-run provision effectively prevents an elected officeholder who is unwilling to resign, from seeking federal office. It therefore limits the choices available to the electorate.

The impact of the Arizona resign-to-run provision extends beyond Arizona's voters. It is a state's attempt to unduly restrict the choice of candidates for the United States Congress. By enacting a law which restricts the selection of candidates for national office, the state attempts to impose its will in an area where it is, by the Constitution, powerless to do so. As this Court recently ruled there is an overriding ". . . pervasive national interest in the selection of candidates for national office, and *this national interest is greater than any interest of an individual state. Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)." *Celebreeze v. Anderson*, 103 S.Ct. at 1573 (Emphasis added).

No matter how compelling Arizona's interest is, it cannot override the national interest in the unrestricted choice of candidates for federal office. This national interest affects every citizen in the country, and a state is powerless to attack or limit this national interest.

2. National uniformity is needed because State provisions requiring resignation of state officeholders when running for federal office and judicial interpretation of those provisions vary greatly.

As set forth in Appendix C, at least 35 states have constitutional or statutory provisions that require state officeholders to resign from their offices when they either seek election to or are elected to federal office. The case law interpreting these provisions is not con-

sistent. *See generally, Joyner v. Mofford*, 706 F.2d 1529-30 and fn. 4.

These state provisions are resign to qualify to run, resign to run, and resign upon election to other office statutes and some declare certain officeholders ineligible during their term. This great diversity precludes a uniform approach to candidacy to federal office. This Court should address the important issue of whether a state can in any way affect the eligibility of state officeholders to run for Congress. National uniformity should be established.

If the decision of the Ninth Circuit is upheld, then based on the number of states that have already shown an interest in regulating the conduct of their officeholders running for federal office, the potential for the adoption in each of the states of the type of regulation that Arizona has, is very significant. This potential raises the very real possibility of a *de facto* amendment to the United States Constitution, adding a fourth qualification to the Qualifications Clause.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of The United States Court of Appeals for The Ninth Circuit.

Respectfully submitted,

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